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The battle over civil rights law has been waged on many different fronts at the same time. Historically, the emphasis has been on the manifest injustices that dominant groups have inflicted on other groups with less political power. Economically, the dispute has been over whether civil rights legislation will increase or reduce overall levels of production. Sociologically, the question has been whether civil rights legislation can overcome hierarchy and foster a sense of community among equals, or whether it increases levels of group consciousness, which in turn leads to issues of group separation.

In most modern settings, this search for rationales has not stemmed from any doubt about the wisdom or even the necessity of civil rights laws. Quite the opposite, the desirability of these laws is usually taken for granted, and the inquiry then proceeds with the aim of finding the most powerful intellectual base on which these laws can rest. But the evident increase in racial and ethnic conflict and the massive attention to sex differences or gender relations — even the terms used in the debate will say a lot about which side an advocate is on[1] — show that the old confidence about the desirability of these laws has been shaken by an ever-increasing awareness that things have not turned out quite the way the supporters of civil rights legislation had hoped.

That sense of disappointment is evident in the disagreement over fundamental objectives. On the one hand, commentators commonly proclaim that the purpose of civil rights legislation is to make institutions and individuals ignore those differences of race

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1. For a recent overview, see Alan Wolfe, *The Gender Question,* NEW REPUBLIC, June 6, 1994, at 27 (reviewing SANDRA L. BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY (1993), HELEN W. HASTE, THE SEXUAL METAPHOR (1994), and JUDITH LORBER, PARADOXES OF GENDER (1994)).

and sex that are morally irrelevant from a proper point of view.[2] That line of argument works well when the question is whether someone from a privileged class — usually, but not always, a white male — should be allowed to indulge a "taste" for discrimination against individuals who fall outside that preferred group. But the language of moral irrelevance quickly disappears from view when the question is whether affirmative action programs should redress grievances against particular groups, or whether considerations of diversity should permit — or require — institutions to take into account matters of race or sex in order to obtain the proper internal institutional balance,[3] independent of whether the individuals involved have been the targets of past discrimination. These two conceptions clash in uncomfortable ways and have led to a certain amount of bobbing and weaving in an effort to justify state-imposed preferences that to the undiscerning eye may look like forms of reverse discrimination, all for motives that could vary from lofty to suspect, depending on the interlocutor's point of view.

The utter ambivalence over the nature and justification of civil rights laws is not easily remedied, and perhaps we should not even try to supply the needed rationalizations. I have stated as openly, forcefully, and frequently as I can: these laws should be repealed as quickly as possible to the extent that they regulate the behavior of private parties in competitive employment markets, and indeed in other competitive markets, such as education and housing.[4] The point of this argument is that open markets can allow separate and distinct institutions to forge their own policies on discrimination. Burning questions of diversity and affirmative action need no longer be collective issues, and governments do not have to decide,

2. The most systematic and thorough application of the caste principle to modern questions of race and sex discrimination is Cass R. Sunstein, *The Anticaste Principle,* 92 MICH. L. REV. 2410 (1994) (this issue), which ably presents a defense of the caste principle to which this article is in part a response.

3. Judith Lorber, it appears, argues for "scrupulous gender equality," meaning that 50% of the employees in each job category should be male and 50% should be female. *See* LORBER, *supra* note 1, at 298; *see also* Wolfe, *supra* note 1, at 32. Lorber cares not a 1, at 298; *see also* Wolfe, *supra* note 1, at 32. Lorber cares not a whit for total output — which will fall precipitously — or for individual freedom — which will disappear under the crush of government mandates.

4. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992). For subsequent elaborations, see Richard A. Epstein, *Standing Firm, on Forbidden Grounds,* 31 SAN DIEGO L. REV. 1 (1994) [hereinafter Epstein. *Standing Firm*] (answering my many critics), and Richard A. Epstein, *Why the Status Production Sideshow; or Why the Antidiscrimination Laws Are Still a Mistake,* 108 HARV. L. REV. (forthcoming Mar. 1995) (commenting on Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination,* 108 HARV. L. REV. (forthcoming Mar. 1995)).

once and for all, whether they believe in color-blind rules, affirmative action, diversity, or strict proportionality, nor do they have to do the mental gymnastics necessary to defend all these positions simultaneously. Separate institutions can go their separate ways. The overall level of social output should increase without the dangerous side effects and resentments that are brought on by ever more intrusive forms of government regulation. More important, perhaps, the truly powerful and insidious institutions of caste and domination could not survive in a world in which the presumption was set against the exercise of state power, the law of contracts enforced private bargains, the law of tort controlled private aggression, and public officials acted in a neutral and impartial fashion toward all citizens in the protection of these private rights.

The usual response, however, has not been to give up on civil rights laws but to find ways to imbue them with a new life and vitality. One way to achieve that goal is to create the kind of focus on outrages and abuses that lent the movement its great moral power in the years before 1964. It is, I think, not quite coincidence that public television often replays the clips of Marion Anderson singing "My Country 'Tis of Thee" on the steps of the Lincoln Memorial and relives the early triumphs of Thurgood Marshall in *Brown v. Board of Education*.[5] It is a form of nostalgia that allows the rejuvenation of a social fabric grown weary with the travails of Benjamin Chavis.[6] More generally, the effort has been to show that the evils of racism and sexism that we face today are, in more subtle form, the same evils we have faced in times past. One way to achieve that result is to claim that we have today, again in more subtle form, the same kind of economic and social "caste" system that operated in the Old South during the heyday of Jim Crow. The social and legal barriers that are still in place prevent the emergence of the kind of social equality and economic competitiveness that would render all forms of civil rights laws unwise and unnecessary. Until that equality emerges, some form of government action is necessary to redress the injustices of the past and to restructure the society of today.

I think that any effort to portray the current social situation as the outgrowth of traditional castelike policies confuses the outgrowth of multiple and uncertain social forces with explicit legal

5. 347 U.S. 483 (1954).

6. *See* Ellis Cose & Vern E. Smith, *The Fall of Benjamin Chavis*, NEWSWEEK, Aug. 29, 1994, at 27; Steven A. Holmes, *After Ouster of Chavis, Uncertainty for N.A.A.C.P.*, N.Y. TIMES, Aug. 28, 1994, § 4, at 2.

distinctions. We must be aware of establishing formal distinctions between persons, sanctioned and recognized by law — an establishment that helps to perpetuate the same rigid class distinctions that a liberal society should seek to obviate. This result is evident in the work of radical feminists who want to impose their own vision of a just society on those who do not share their own beliefs and conviction. But it is also evident in the work of moderate institutions that are not attentive to what those feminists do.

One illustration will have to suffice. The evolution of the 1964 Civil Rights Act[7] shows how easy it is for castelike notions to creep in through the back door of the very law that was designed to expel them. The original text is the paragon of neutrality insofar as it makes it unlawful for any employer — not all *people* or all *employees* — "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."[8] The studied effort of the section is to use impersonal language that speaks of a universal obligation, the antithesis of caste. But in just one unthinking decision, *McDonnell Douglas Corp. v. Green*,[9] the Supreme Court changed the ground rules under the Act from universal to particularistic when it announced that any individual could make out "a prima facie case of racial discrimination . . . by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open."[10] But it is a whopping non sequitur to declare that only members of racial minorities can be victims of racial discrimination under the statute, even if such individuals are in fact more likely to be the targets of such discrimination. The casual way in which the Supreme Court imposed formal restrictions on eligibility under the Civil Rights Act at that first stage of the prima facie case shows how easy it is to introduce castelike distinctions into a law that a few short years before had been dedicated to their elimination. From the use of protected classes, it is only a short step to the idea of affirmative action,[11]

7. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000h-6 (1988)).

8. 42 U.S.C. § 2000e-2(a)(1) (1988).

9. 411 U.S. 792 (1973), *criticized in* EPSTEIN, *supra* note 4, at 167-81.

10. 411 U.S. at 802.

11. *See* David A. Strauss, *Biology, Difference, and Gender Discrimination*, 41 DEPAUL L. REV. 1007, 1019 (1992) (agreeing with my analysis that the use of protected classes and af-

which adds the carrot to the stick and further reinforces the race and sex distinctions the statute was designed to eliminate.

In this essay, therefore, I address the notion of caste in two separate contexts: in the traditional disputes over race and sex, and in the more modern disputes over sexual orientation. In both cases the idea of caste and its kindred notions of subordination and hierarchy are used to justify massive forms of government intervention. In all cases I think that these arguments are incorrect. In their place, I argue that the idea of caste should be confined to categories of formal, or legal, distinctions between persons before the law. This more limited notion of caste supplies no justification for the enforcement of any civil rights law that purports to limit the freedom of association among individuals, whether their connections be intimate and personal, economic and professional, or religious and social. But by the same token, this limited conception mirrors the older conception of civil rights law — a conception that restored to individuals the capacity to contract and to form associations of their own choosing.[12] Judged by that standard, many laws on the books today are illegitimate, limiting associational choice between individuals, as laws once did under Jim Crow in the South, or as the pre-twentieth-century legal disabilities of women did. In particular, the current prohibitions against same-sex marriages are themselves a mistake — regardless of what one thinks of the wisdom or morality of these marriages — and should be rejected as inimical to the basic principle of freedom of association on which a liberal society should rest. Rightly understood, the idea of caste works best when confined to its original understanding. The effort to expand that conception obscures the critical distinction between removing and imposing state barriers to voluntary associations. The older, liberal conception of civil rights law thus makes far more sense than its modern competition.

## I. Race and Sex

The first effort to expand the notion of caste beyond its formal base has been in the area of race relations. It is easy to denounce the Jim Crow rules of the old South as the creation of a caste system insofar as the system had formal segregation in public schools, explicit racial segregation on public transportation, and an explicit

firmative action are not significantly distinct, but reaching the opposite conclusion — that is, that both practices should be preserved).

12. For a longer discussion, see Richard A. Epstein, *Two Conceptions of Civil Rights*, Soc. Phil. & Pol., Spring 1991, at 38.

prohibition on racial intermarriage. Kenneth Karst, a champion of the communitarian view, has stated this position well.[13] The Court upheld these racial restrictions in *Plessy v. Ferguson*,[14] and it took not only *Brown v. Board of Education*[15] but a host of other decisions to root out segregation in American life.[16] But the identification of these restrictions as abuses need not translate into a need for big government. Quite the opposite — the removal of these restrictions is perfectly consistent with the program of a limited-state libertarian, an individualist to the core, who wholeheartedly champions the civil rights movement to the extent that it allows all persons the equal protection of the common law rules of property, contract, and tort, and equal legal rights to vote and otherwise participate in public affairs. The first civil rights movement aimed to assure the capacity of all persons to enter into voluntary transactions, to hold property, and to sue and be sued,[17] and insofar as it sought to create capacities and remove legal disabilities, it is an essential part of the liberal and individualist program to the same if not greater extent than it is part and parcel of the modern civil rights agenda.

The modern antidiscrimination norm requires each person within a group to treat with equal respect all other persons, regardless of their race, creed, sex, religion, or national origin. These principles are designed not to further the principle of freedom of

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13. *See* Kenneth Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME LAW. 183, 200-14 (1980); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986) [hereinafter Karst, *Paths to Belonging*]. Karst writes:

> Jim Crow illustrates the main technique of nativist domination: the enforced separation of members of the subordinate cultural group from a wide range of public and private institutions that, in the aggregate, constitute "society." Racial segregation in the American South was the successor to slavery and the Black Codes, both of which had been decisively made unlawful by congressional legislation and the Civil War amendments. In this historical context it is easy to see Jim Crow for what it was: a thoroughgoing program designed to maintain blacks as a group in the position of a subordinate racial caste by means of a systematic denial of belonging.

*Id.* at 320-21.

14. 163 U.S. 537 (1896).

15. 347 U.S. 483 (1954).

16. *See, e.g.*, Turner v. City of Memphis, 369 U.S. 350 (1962) (municipal airport restaurant); New Orleans City Park Improvement Assn. v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); *see also* Karst, *Paths to Belonging*, *supra* note 13, at 323 n.136.

17. *See* Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982 (1988)) (addressing the right to hold property); Act of May 31, 1870, ch. 114, § 16, 16 Stat. 144 (codified as amended at 42 U.S.C. § 1981 (1988)), *amended by* 42 U.S.C. §§ 1981(a) to 1981(c) (Supp. V 1993) (addressing the right to enter into contracts and the right to sue and be sued).

association but to limit its scope, in effect, by requiring that certain characteristics regarded as morally irrelevant by some general theory must be treated as irrelevant by all individuals in their private decisions — with the usual sting — whether they like it or not. In part this theory seeks to rely on the same set of instincts that led the first wave of civil rights reform; it indicates that persons — notably blacks and women — who have been treated as inferiors and subordinates in their economic or social status should be accorded the special protection of the law.[18]

Yet here there is a fatal flaw in the effort to link the formal differences in legal status with the economic and social deprivations that some groups suffer, or are said to suffer, in society — in effect, to make disparate results in gross statistical analyses of economic success analogous to caste. We should remember, though, that *caste* is not a synonym for *subpopulation. Caste* means something very specific — that is, a hereditary class structure. Thus my *Webster's* gives as its first definition of *caste* a narrow one: "one of the hereditary social classes in Hinduism."[19] The stress on hereditary positions in a caste does not seem to transfer easily to the contemporary American environment, in which no formal structures — except, of course, the civil rights laws — enforce social or economic stratification based on inborn characteristics. This is especially true in a world of racial intermarriage, and without some very sophisticated translation, the focus on hereditary positions makes no sense at all with respect to distinctions between men and women.

Most importantly, however, castes are formal constructs that tie explicit privileges to each discrete status. But there is no lockstep connection between group identity and economic position. It is possible for a group to be the target of legal discrimination and subordination on the one hand and yet to be economically prosperous on the other. That was surely the case in the early years of the Nazi regime for the Jews, who were at best second-class citizens, and is the lot of many Indians who have left India and have settled and worked in various African countries.

Any concern with economic differentials and disadvantages should not blind us to the fact that first and foremost in any caste system is the traditional concern with explicit legal differences in capacities or entitlements based on the accidents of birth: race, sex,

18. *See, e.g.*, Sunstein, *supra* note 2, at 2428-29.

19. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 212 (1984). The more general definition refers to "a division of society based on differences of wealth, inherited rank or privilege, profession, or occupation." *Id.*

religion, and national origin. The effort to find evidence of de facto discrimination should not blind us to the obvious point that de jure, explicit, and formal discriminations by the state are still the first evil, whether or not they produce the economic inequalities with which they are often, but not necessarily, associated. It is dangerous to pump up economic and social differences by using a word that makes them sound like formal legal distinctions imposed by operation of law and against the will of the parties so bound and disadvantaged.

As one might expect, the economic data are balky as well. African Americans today do not do well by many of the standard measures of success. The United Nations Development Programme (UNDP) has constructed a human development index, incorporating three basic elements by which it rates various nations and groups within nations: life expectancy at birth, education, and income.[20] Under these measures the United States is said to rank sixth behind Japan, Canada, Norway, Switzerland, and Sweden,[21] though the differences among these nations are all trivially small, with numbers ranging from 0.983 for Japan to 0.976 for the United States.[22] But the story is quite different when the divisions are made by race. On that scale American whites move to first place on the list, a small change given the defects in the basic index. But American blacks receive a score of 0.875, which would place them in thirty-second place on the list of nations, just behind Trinidad and Tobago, while American Hispanics — including many recent immigrants from Latin America, so the figure is systematically misleading — would rank thirty-fifth, just behind Estonia, with an index of around 0.87.[23] The data should surely give everyone pause.

20. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1993, at 10, 104 (1993) [hereinafter HUMAN DEVELOPMENT REPORT]. The Human Development Index (HDI) ranges from 0.983 for Japan to 0.045 for Guinea; HDI scores are computed by subtracting a composite score — referred to as a nation's "average deprivation" — from 1. *See id.* at 135-37, 100-01.

21. *See id.* at 135 tbl. 1.

22. The small differences relate to imperfections in the construction of the index. The educational component, for example, takes into account basic literacy, which is at 99% for all developed nations; mean years of schooling, which shows only little variation; and a literacy index, which likewise is at 1.00 for the first 14 nations on the list. *Id.* at 100-01. There are also only a few years' variation in life expectancy in the developed nations; the figure hovers in the mid-70s for males and females born in 1990. *Id.* The major differences come in the income figures, and these are subject to genuine difficulties in conversion in that the variations in standards of living do not track the higher volatility of exchange rates in a one-for-one fashion. *Id.* at 106-07. The rankings at the top are therefore close to arbitrary and the bunching effect is evidence, not of the closeness of these nations to each other, but of the insensitivity of the variables chosen.

23. *Id.* at 18 figs. 1.12 & 1.13. The numbers are approximate, from the graph. It is also striking that black females do far better than black men on the scale. The aggregate figures

Nonetheless, to draw an inference of caste from this data is to ignore the enormous differences in life fortunes and expectations among the individuals who fall within any given population — differences not discussed in the UNDP report. For its part, however, the very notion of a formal caste does not admit of these degrees of informal differentiation; all members of the subordinated group are forced to ride in the back of the bus, so to speak. The very fact of significant variation in social success within groups is itself evidence that some process far more complex than caste differentiation is involved. There is little doubt that black professional women, for example, earn far more than unskilled white male laborers do. These distinctions in income within racial groups are largely attributable to the very broad categories of workers who are lumped together in a single class: the label *accountant,* for example, covers both people who do simple audits and those who structure complex financial transactions.[24]

But even if we put that point aside, there is no reason to believe that differences in economic or personal well-being are solely, or even mostly, the result of social forces rather than individual effort. In particular, it is wrong to say that any observed differences in group achievement levels should be attributed as a matter of course to social practices or institutional structures. In some instances the differences might well be attributed to personal motivation, family structure, hustle, and luck. At some point the consequences of individual failure should be laid at the feet of the individual who fails, for if they are not, then the incentives for success are effectively undermined. An ethic of personal responsibility is not meant solely to point the finger at those who fail. Its prime objective is to give individuals incentives to succeed so that no fingers need be pointed at them after the fact. The willingness to create collective responsibility for individual failure has as its unfortunate consequence an increase in the rate of failure. It is not possible to create the right incentives for individual achievement by resorting only to carrots but never to sticks, and it is not possible to get the right mix of incentives by appealing to the idea of pervasive social discrimination as the source of lower economic and educational achievement for some African Americans. Indeed, at least twenty years of ag-

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are around 0.90 for females and 0.86 for males, *id.* fig. 1.13, and these numbers surely understate the difference because they give more weight to the greater black male income than is appropriate for any overall measure of individual well-being. It is hard to attribute these sex differences to any form of racial discrimination.

24. *See* VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 49-52 (1988) (suggesting this analogy in an analysis of the "wage gap" between men and women).

gressive enforcement of civil rights laws designed precisely to eliminate such social discrimination and "caste distinctions" has done little to redress the worrisome trend in these statistics.[25] The sources of the current social difficulties cannot be explained by a simple appeal to the notion of caste.

Current social practices are also inconsistent with the idea that African Americans are the victims of caste distinctions within this country. Indeed, while African Americans are experiencing lower levels of success by the standard economic measures, there is at the same time a systematic set of programs, both public and private, that discriminate in their favor on grounds of race. Many of the public programs for affirmative action or diversity introduce explicit notions of caste by allowing African Americans certain advantages based on race that are denied to others. I am hard pressed to identify any real caste system in the history of the world that has had affirmative action programs for members of its disadvantaged groups. The result is a rare juxtaposition of phenomena: declining economic fortunes for African Americans at the same time that there is a steady or increasing level of explicit legal advantages. It is hard to see how a return to older principles of freedom of association and equality of all persons before the law could do much to alter the situation for the worse.

The economic data on caste with respect to women is even more suspicious. To look at the UNDP's report, one might think that there was a major scandal brewing in the world. When the UNDP breaks down its HDI by sex, it comes up with the bald — and false — categorical conclusion: "No country treats its women as well as it treats its men."[26] To support this conclusion it takes the breakdown of its HDI by sex and notes that for the first-place country, Sweden, the HDI is 0.977 overall and 0.921 for women, while for the United States the comparable drop is from 0.976 to 0.824.[27] It should be quickly apparent that something is sadly amiss, because the index measure states that the position of American women is below that of the citizens of, among other countries, Trinidad and Tobago and Estonia.[28] In fact, the position of the average American woman is just below that of the average citizen of Poland and

25. *See* James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POLY. REV. 276, 276 (1990) ("[S]ince 1975, relative black economic status has not advanced and may have deteriorated slightly.").

26. HUMAN DEVELOPMENT REPORT, *supra* note 20, at 16 fig. 1.19.

27. *Id.* tbl. 1.3.

28. *Id.* at 135 tbl. 1.

Georgia, both long under communist rule.[29] Because the women in these countries are clearly less well-off than the men, it seems that the American woman is far worse off than the men of Romania and Albania, although these numbers are mercifully not included in the report.

Clearly there is something bizarre about this rank order, and it is easy to see what it is. The UNDP report uses, ironically, a male-centered analytical methodology: to the extent that women match up statistically "like men," the report sees them as successful. Yet the report makes no effort to recognize the economic contributions made disproportionately by women — contributions that are not contained in its limited data set. While the UNDP report insists that the lives of human beings are what is really at stake,[30] its treatment of sex differences makes a mockery of that claim. Thus, in looking at the breakdown by sex, it is clear that women outlive men — and the disparity is greater for blacks than it is for whites[31] — and that female levels of literacy are higher as well. The UNDP gives all females in the United States a rating of 103.0% in life expectancy — with 100% representing parity with men — and 101.6% in educational attainment.[32] All the negative data then come from the economic indicators on adjusted gross domestic product, whereon American women rate at 48.7 relative to men's 100.[33] Surely a moment's reflection shows that something is deeply amiss. How can American women achieve at least parity on life expectation and education if they have only half the income of men?

What is missing in the report is any notion that family units engage in cooperative production and distribution, whereby women invest more of their time in work in the home, for which they do not receive any cash payment from a third-party source. This work generates enormous amounts of imputed income, which the women share with their husbands and families, just as husbands share their market-based wealth with their wives and their families. There is a pooling of income and gains from trade. A similar story has to be told when the inquiry turns from wages to income from stocks and

29. *Id.*

30. *See id.* at iii.

31. *See id.* at 18 fig. 1.13. White American females have a life expectancy of somewhat over 77 years, and for white American men, the figure is 75. For black females the life expectancy is somewhat over 72 years of age, and for black men, somewhat less than 69. *Id.*

32. *Id.* at 101 tbl. 1.1.

33. *See id.*

bonds. I have not done any close work on the subject, but information supplied by the New York Stock Exchange suggests that the average male has a portfolio of about $13,500 in stock, while the average female has a portfolio of little more than half that size, or $7,200.[34] But once again the raw data cry out for correction, for the key question for social welfare is not who receives the dividend checks but who spends the proceeds and to what ends. The same kind of informal redistribution with the immediate — and extended — family that happens all the time with earned income happens with investment income as well: there are massive amounts of redistribution within families that are not caught by the official exchange statistics. The problems, moreover, are complicated still further by the complex patterns of survivorship rights that are applicable to substantial assets that are placed in pension or private trusts. There are more widows than widowers in the United States, and spousal protection usually ranks higher than the passage of wealth onto the next generation in the eyes of most decedents. I am in no position to conduct the detailed empirical study that is necessary to determine the actual divisions and effective control of wealth by sex in our society. But the educational and life expectancy figures surely provide some clue that this redistribution is substantial, for it is difficult to understand how women could do so well as a group by these output measures if they had so few inputs to work with.

Unfortunately, the UNDP report makes no effort to capture any of these effects, and every effort to ignore them, when it blandly concludes as follows: "In industrial countries, gender discrimination (measured by the HDI) is mainly in employment and wages, with women often getting less than two-thirds of the employment opportunities and about half the earnings of men."[35] Even within the paid sector, there is no effort to make adjustments to take into account years of specialized education, years of experience, or hours committed to the workplace. To give some idea of how misguided the UNDP figures are, the better studies on comparable worth indicate that male-female differences when job classifications are held constant are, at a maximum, ten to fifteen percent, and even that gap disappears when marital status is taken into ac-

34. NYSE SHAREOWNERSHIP 14-15 (1990). Information provided by Bethann Ashfield, New York Stock Exchange Library.

35. HUMAN DEVELOPMENT REPORT, *supra* note 20, at 16-17.

count:[36] "Women who have never married have historically received wages roughly comparable to men's."[37]

The UNDP conclusions on the differential status of men and women are, then, worse than worthless. They are positively misleading and downright mischievous. Moreover, for our mundane purposes they do not advance the idea that women are a subordinated caste by so much as a millimeter. Overall, there is little mileage in the idea of using caste as a way to get at the social and economic differences that are found among members of a society. Likewise, I think that there is little to be gained by seeking to use the idea of caste to justify an antidiscrimination law that is designed, not to eliminate formal barriers to association and exchange, but to override in its very conception the freedom of association that should lie at the heart of any rational liberal order.

## II. Discrimination and Sexual Preference

The most vivid illustration of the arguments about caste arise in the context of sexual preferences. At present there is a good deal of litigation and dispute over the legal rights of gays and lesbians in the United States. At one level the demands are for associational freedom — that is, for the state to recognize and enforce same-sex marriages on the same terms and conditions on which it recognizes and enforces marriages between men and women. Here the concern is parallel to the formal restrictions on interracial marriages. It is therefore quite proper to argue that these formal restrictions at least raise the specter of caste differences between persons. But at the same time there is an equal concern about extending the protection of the antidiscrimination norm in employment and housing, for example, to gays and lesbians. In essence, the effort to remove formal barriers to gays and lesbians is accompanied by an attack on the informal barriers as well.

The bundling of these two programs in the same package creates all sorts of tensions that are nicely brought to bear in the extraordinary judicial proceedings that have taken place in Colorado over its recent popular constitutional referendum — Amendment 2[38] — preventing state and local governments from enacting antidiscrimination laws that would treat gays, lesbians, and bisexuals

36. *See, e.g.*, Ellen F. Paul, Equity and Gender: The Comparable Worth Debate 16 (1989). She relies on studies by Paul Weiler. *See* Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728, 1784 (1986).

37. Paul, *supra* note 36, at 17; *see also* Weiler, *supra* note 36, at 1785.

38. Colo. Const. art. II, § 30b.

as classes protected from discrimination in employment and housing, or indeed from any form of discrimination.[39] The Colorado Supreme Court recently struck down Amendment 2 on the grounds that the state had not shown a compelling state interest to justify the amendment's infringement on the right of those affected by the provision to participate equally in the political process.[40]

In one sense, the decision invalidating Amendment 2 bears some resemblance to one of the most important and controversial decisions of the Warren Court, *Reitman v. Mulkey*.[41] At issue in that case was an amendment to the California Constitution passed by referendum. The amendment provided: .

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or who desire to sell, lease or rent any part of all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.[42]

The provision did not apply to real estate owned by the state.

In *Reitman,* the Court struck down the provision on the grounds that by incorporating the provision into its constitution, the state "authorized" the forms of discrimination that had previously been prohibited under the Unruh and Rumford Acts,[43] which were necessarily overridden by the new constitutional provision.[44] As is typical in dubious constitutional decisions, the Court refused to find that any dispositive test existed to demarcate state action from private action and instead announced that all depends on "sifting facts

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39. The provision reads:

> *No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation.* Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b. The amendment clearly attacks bans on private discrimination and appears to reach discrimination by the state as well. *See* Evans v. Romer, 854 P.2d 1270, 1284-85 & n.25 (Colo.), *cert. denied,* 114 S. Ct. 419 (1993).

40. Evans v. Romer, Nos. 94SA48, 94SA128, 1994 Colo. LEXIS 779 (Oct. 11, 1994). The court initially held that the amendment should receive strict scrutiny in Evans v. Romer, 854 P.2d 1270 (Colo)., *cert. denied*, 114 S. Ct. 419 (1993).

41. 387 U.S. 369 (1967).

42. CAL. CONST. art. I, § 26 (enacted 1964, repealed 1974) (enacting Proposition 14).

43. Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 1982 & Supp. 1994); Rumford Fair Housing Act, CAL. CIV. CODE § 35720 (West 1973), *repealed by* Act of Sept. 19, 1980, ch. 992, 1980 Cal. Stat. 3166 (codified at CAL. GOVT. CODE § 12955 (West 1992 & Supp. 1994)).

44. 387 U.S. at 376-77.

and weighing circumstances."[45] But surely this idea of state authorization is extended so far as to be useless for making any decision. Authorization normally connotes a situation in which one person authorizes another to act on his behalf, so that the acts of the agent are then sufficient to bind the principal. Yet this provision properly exempted state property from its scope.[46] Moreover, even if the state authorizes the autonomous acts of its own citizens through this provision, which acts does it authorize — only those that involve racial discrimination against preferred classes? Or those that discriminate in their favor? Or those decisions that purport to follow a color-blind policy in selling or leasing? These policies are all diametrically at odds with one another, and it is far more accurate to insist that the state authorizes *none* of them than to pretend that it authorizes them all. The decisions to exclude or include are made by the individuals in question. They are only *enforced* by the state, which does not take a position as to their intrinsic desirability, any more than it does when it solemnizes a marriage between two persons of the same race, neither of whom would on principle marry a person of a different race. In my view, the initial provisions of the Unruh and Rumford Acts should have been struck down as illicit forms of state action that interfere with the liberty and property rights of individuals, so that the corrective referendum should not have been needed at all. But, as it was, *Reitman* followed the line set originally by *Shelley v. Kraemer*[47] and *Barrows v. Jackson*[48] and sought to obliterate the public-private distinction under a clause that aimed to constitutionalize it.[49]

This constitutional tradition makes it difficult to think about the wisdom of Amendment 2. In principle, the background rules against which the soundness of the amendment is evaluated are critical to the inquiry. As I have argued, the proper background condition is one that allows all private individuals to choose the persons with whom they wish to associate and deal. To say, therefore, that any person can refuse to deal with gays or lesbians is not to say very much at all. All individuals also have the right to refuse to deal with heterosexuals or indeed any other subclass of the general pop-

45. 387 U.S. at 378 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961)).

46. CAL. CONST. art. I, § 26 (repealed 1974). It also excludes innkeepers, who were at common law subject to an antidiscrimination provision.

47. 334 U.S. 1 (1948).

48. 346 U.S. 249 (1953).

49. For my criticism of the *Shelley* line of cases, see Epstein, *Standing Firm*, *supra* note 4, at 29-33.

ulation. On this view, therefore, the amendment is quite simply unnecessary as it only confirms a set of rights that are already universally held.

That simple approach will not do, however, in a world in which the antidiscrimination norm is regarded as superior to the principle of freedom of association. If the law now says that one cannot discriminate on the grounds of race, ethnic origin, sex, age, religion, or disability, then why should it single out sexual orientation as an area in which the ancient principle of freedom of association is allowed full sway against its two traditional antagonists: criminalization of the relationship and the antidiscrimination ordinance? Viewed in this context, the very passage of the referendum could be viewed as an effort to impose second-class citizenship on some persons for the benefit of others. Indeed, it was just this argument that led the Colorado Supreme Court to insist that the amendment be subjected to strict scrutiny,[50] even after *Bowers v. Hardwick*[51] apparently closed the door on any ordinary strict scrutiny attack on equal protection grounds.[52] Thus the Colorado decisions stress that what is at stake is not gay and lesbian relations as such but their connection to participation in the political process:

> Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden — no other group's ability to participate in the political process is restricted and encumbered in a like manner. . . .
>
> In short, gay men, lesbians, and bisexuals are left out of the political process through the denial of having an "effective voice in the governmental affairs which substantially affect their lives." Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons. Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them.[53]

By this standard the amendment is surely dead on arrival. But the question is why this standard should be applied at all. If Amendment 2 were confined to private parties alone, then in a world of freedom of association, the amendment would be redundant and unnecessary and the singling-out argument raised in the opinion

50. *See* Evans v. Romer, 854 P.2d 1270, 1282 (Colo.), *cert. denied*, 114 S. Ct. 419 (1993).

51. 478 U.S. 186 (1986).

52. *See* 478 U.S. at 190.

53. 854 P.2d at 1285 (quoting Gray v. Sanders, 372 U.S. 368, 379-80 (1963)); *see also* Evans v. Romer, Nos. 94SA48, 94SA128, 1994 Colo. LEXIS 779, at *5, *10 (Oct. 11, 1994).

would fail.[54] Precisely because association rights are accorded such low status, the defenders of this amendment, at least as it is applied to private parties, are now put to a cruel choice. In order to defend part of the turf of freedom of association, they have to make it appear as though they harbor special animus against the groups that want to claim the protection of the antidiscrimination ordinance. It is no longer possible to argue simply that people should be able to choose to associate with some individuals but not with others without giving learned reasons for their choice. Instead, proponents of the amendment must give long and elaborate explanations as to why some groups are unworthy, by some public standard, of a guarantee of the same level of protection that is accorded to other groups. The net effect, therefore, is to invite both testimony and rebuttal on the issue of whether homosexual conduct is or is not immoral or whether it is or is not against the public interest. Moreover, it is to do so, not in open public debate, but in the context of expert testimony in a courtroom setting — hardly the place to have a sensible debate over any sensitive social issue.[55] The inability to rely on freedom of association means that all refusals to associate have to be for cause, so that individuals and groups who wish to be left alone now have to engage in the unhappy task of group defamation in order to achieve that rather simple end. The upshot is that the entire process sanctions a level of antigay and antilesbian rhetoric that is better left unspoken in public settings.

Importing rhetoric of this sort into the political process can hardly do anything to build the strong sense of mutual respect on which political communities are supposed to rest. Indeed, there is reason to believe that it can only make matters far worse. The

54. For what it is worth, this argument also seems wrong for another reason. All sorts of people who are neither gay, lesbian, nor bisexual could, and did, oppose the amendment. The disabilities created in the amendment are directed to one class, but the limitations on participation in the political process are not.

55. For excerpts of this courtroom debate, see the testimony by John Finnis and Martha Nussbaum, first for and then against the amendment. John Finnis & Martha Nussbaum, *Is Homosexual Conduct Wrong? A Philosophical Exchange,* NEW REPUBLIC, Nov. 15, 1993, at 12. I venture no opinion on the accuracy of classical references, but Finnis's testimony surely is fatal to his own cause insofar as it equates homosexual conduct with "all extramarital sexual gratification." *Id.* (citing Plato, Xenophon, Aristotle, Musonius, Rufus, and Plutarch). Finnis just misunderstands the situation if he even thinks that the people who supported Amendment 2 would extend it to unmarried couples living together, or even to casual heterosexual contact. His condemnation of sex outside marriage sweeps far too broadly for the occasion. In any event, this testimony is odd indeed because what is at stake is an antidiscrimination ordinance that could be in place even after homosexual conduct is decriminalized. Moreover, his argument that homoerotic culture should be discouraged because it is incompatible with true friendship, *id.,* is an observation that does not need the force of law behind it, even if it is true.

traditional position of individualism has a great virtue insofar as it does not link freedom of association to the endorsement of the modern antidiscrimination principle of the civil rights laws. Today it is too often assumed that the proposition that *A* has the right to do *X* carries with it two distinct implications: first, that no one can punish or sue *A* for having done *X*, and second, that no one can discriminate against *A* in personal or business dealings for having done *X*. For example, once we decide that people cannot be punished because they have once used drugs, then we have necessarily decided that private employers and landlords cannot discriminate against people for just these same reasons. Similarly, once we have decided that homosexual conduct is not criminal, then we are necessarily committed to the proposition that employers and landlords cannot discriminate against gays and lesbians in their private affairs; nor, for that matter, can employers and landlords discriminate in their favor.

The connection here is unfortunate because, among other things, it encourages resistance to the first step — legalization and recognition — because of the fear that the second step — forced association — will follow. For example, the question of the legality of same-sex marriages has bullied its way to the front of the constitutional agenda.[56] The arguments in favor of their legalization are strong as a matter of political theory. The principle of freedom of association is no weaker on matters of intimate association than it is on matters of business association, and it may be stronger in the sense that it can resist regulation even with compensation. But for our purposes, the key point is that outsiders cannot point to their own distaste for the practices, or to their strong religious convictions and objections, as public reasons to render these unions unlawful. Surely the principle of offense cannot be used to prevent gay and lesbian couples from normalizing their relationships by

56. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that a strict scrutiny standard must be applied to determine whether the state prohibition against same-sex marriages should stand). On this same question, see Jennifer L. Heeb, Comment, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347 (1993) (urging that the due process guarantees of privacy to different-sex couples apply to same-sex couples as well). *See also* William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. (forthcoming Mar. 1995) (arguing that competitive pressures for the business of these couples and their supporters will induce some states to break ranks and introduce these marriages, which then must be recognized by other states under the Full Faith and Credit Clause of the Constitution, U.S. CONST. art. IV, § 1).

contract.[57] Once same-sex couples are allowed to use ordinary contractual devices to help keep their relationships on an even keel, it is hard to see why the state should be able to deny them the opportunity to introduce into their relationships the same level of permanence and stability that state sanctions give to marriages between couples of different sexes. It follows that these married couples should be allowed to participate on equal footing with other couples in the benefits that the state confers on marriages: preferred status under immigration laws,[58] with guardianship arrangements,[59] under rent control laws,[60] and in the area of inheritance.[61]

This last set of demands cannot, I believe, be opposed on the ground that it is one thing for the state to suppress an arrangement and quite another to require the state to place its stamp of approval on the full arrangement, which is what legal recognition seems to demand.[62] That question of conferring benefits means far less in the state context given the state monopoly power over the relevant set of licenses, so that the key question — at least for the supporters of a liberal state — is whether the state skews private preferences among various forms of associational freedom, which it surely does when it gives one kind of sexual union a preferred position that is systematically denied to another. The liberal and individualistic argument for same-sex marriages is thus quite powerful and is similar to the argument against the barriers to marriages between different races, which were removed when the Supreme Court de-

57. Often gay and lesbian couples have entered into contracts that spell out the division of financial and personal responsibility and that require each partner to bear some responsibility for the welfare of the other. Understandings of that sort are usually a prerequisite for treating the arrangement as "permanent" enough to qualify for the same types of benefits as married couples receive. See Brown, *supra* note 56, for a list of local governments that award same-sex benefit packages. Many private institutions, including the University of Chicago, have same-sex benefit packages, as do many businesses, including Apple Computer.

58. For an example of the limitations placed on same-sex partners in the context of immigration, see Adams v. Howerton, 486 F. Supp. 1119 (1980) (disallowing "immediate relative" status to an Australian citizen in a same-sex union with an American citizen).

59. For an example of this benefit as extended to same-sex partners, see *In re* Guardianship of Sharon Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991) (allowing a same-sex partner to be appointed guardian over the objections of the ward's parents).

60. For an example of the extension of this privileged status to same-sex partners, see Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (allowing a gay partner to "inherit" a rent-controlled apartment under a statute that permitted these rights to descend to members of the decedent's "family"). One blissful way to avoid this problem would be to abolish rent control, but only if it were abolished for all couples.

61. For an application of this principle in the same-sex context, see *In re* Estate of Cooper, 564 N.Y.S.2d 684 (Sup. Ct. 1990), *affd. sub nom. In re* Cooper, 592 N.Y.S.2d 797 (App. Div. 1993) (disallowing a current partner's rights to inherit as a surviving spouse).

62. *See* Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949, 955 (1992).

clared antimiscegenation laws unconstitutional.[63] It should hardly matter that there are lots of people who are deeply offended by either kind of union or who regard them as violating every sacred religious belief. They are not asked to participate in these unions, and under the liberal theory they could not be required to enter any associations whatsoever with people who choose to enter into them.

The challenge here is whether the case for homosexual rights and same-sex marriages should leap two chasms with a single bound. First, the associational freedom would be preserved and given the same level of protection as other unions. But then the usual protections of antidiscrimination laws would be imposed so that persons in such relationships could not be the subject of discrimination in employment or housing. If that second step would necessarily be taken, then suddenly there is a good reason to keep homosexual relations illegal if the alternative is that a religious fundamentalist would have to lease an upstairs apartment to a gay couple once their conduct is decriminalized or their marriage solemnized.

It is, in my view, a far better world if the owner can keep and act on his own religious and moral scruples on this issue, even if learned academics and legislators are quite capable of proving that his conclusions do not rest on any rational principles that are capable of articulation to nonbelievers. Religious and moral scruples should never limit the freedom of association of gays and lesbians: religious folks are not spared from having to tolerate offensive behavior any more than the remainder of the population is, and if they have to put up with enforceable same-sex contracts short of marriage and with the private recognition of these contracts,[64] then they have to accept the marriages as well. But by the same token, these individuals should be entitled to rely on their own religious and moral convictions, however flawed and imperfect others might believe them to be, in ordering and organizing their own affairs. No principle of community values should encourage either group to be so confident in the soundness of its own moral precepts that it is prepared to force them down the throats of those unfortunate and uneducated enough to disagree with them. All sides should be entitled to the defensive use of their own beliefs under a principle of free association. There is no reason to lurch from a world in which

63. *See* Loving v. Virginia, 388 U.S. 1 (1967).

64. *See supra* note 57.

too little protection is conferred to homosexual individuals and couples to a world in which they receive too much protection.

## Conclusion

I think that some important social lessons can be learned from the recent flirtation with caste as the generative principle behind the antidiscrimination laws. The chief point concerns the relationship between legal prohibitions and social distinctions. It has long been fashionable in legal and policy debates to decry the distinction between de jure and de facto, between formal legal differences and social imbalances. That popular attack, however, has its greatest appeal *after* the legal barriers to associational freedom and political participation are removed, not before. A sad realization often follows the removal of these barriers — the realization that social cures are not quickly or easily achieved if only because differences in living standards, occupational choices, cultural values, social status, and lifestyle survive the removal of legal barriers, and that these differences prove more difficult to eradicate, even if their eradication is desirable. But the situation looks markedly different *while* the legal disabilities are still in place, for then it becomes quite coherent, if not attractive, to assert that all that is asked for is the removal of legal barriers to participation in various forms of social and political life. Think of what we will no longer have: no huge social programs that require massive tax increases or intrusive regulatory schemes; no political gerrymandering; no special privileges; no social campaigns to decide which individuals or groups are victims of past discrimination, which are the perpetrators of that discrimination, and which are innocent bystanders caught in the crossfire between warring political factions. The program seems to promise great gains at little cost. It can be easily endorsed with little more than simple justice as its guide.

The completed campaign for the abolition of Jim Crow and the upcoming campaign for the recognition of same-sex marriages both fall into this tradition. But they are in some ways very odd companions. Jim Crow is a legacy of slavery and domination that worked havoc on the lives and fortunes of a group of individuals who were excluded from formal participation in the political process. With same-sex marriages, the prohibitions and restrictions are directed at individuals who are often highly trained and successful, with good economic prospects, a loud — if minority — voice in the political process, and — paradoxically — a protected-class status under some antidiscrimination laws. The demographics and positions of

the two groups could hardly be more different, and it is doubtful that any political alliance between them could be more than a short-term convenience given these differences in social positions and personal aspirations. Yet it is precisely because each group in its own time targets legal disabilities that they can make a common appeal. A good libertarian who believes that all persons have equal capacity to make the associational choices that govern their own lives has to support these campaigns. It hardly matters whether he or she has any sympathy with the ends and aspirations of the individuals who are denied the ordinary incidents of full citizenship.

Once the legal disabilities have been removed, then we see the emergence of an effort to analogize various economic and social differences to the formal legal differences captured in the idea of caste. It is just at this juncture that the modern civil rights movement makes its greatest blunders. The economic data in question are often impossible to interpret, or are interpreted, if not misinterpreted, with an eye to magnify differences that either do not exist or can be explained, at least in part, by differences in education, training, aptitudes, or inclinations. Even when some unjustified differences continue to persist, it is hard to identify them or to know exactly what steps should be taken to counteract them. The constant refrain has been that irrational prejudice drives the key behaviors in employment and housing, so that all that need be done is to make irrational behavior illegal. Would that it were so simple! The number of cases of pure irrationality that leap out in practice is small, especially in relation to the overall size of the social tensions and conflicts. Reforms that are loudly trumpeted when passed are utterly incapable of delivering on their oversized promises. The net effect of an antidiscrimination law, therefore, is to introduce greater cost and uncertainty into the process, to provoke evasive responses by firms that fear entrapment by the law, and to create resentments on the part of those who fear that the law has done too much or too little to redress the perceived level of social imbalance. In a word, the size of the pie shrinks while its distribution is scarcely improved.

These effects are, in my view, an inescapable consequence of any philosophical outlook that conflates social and economic differences with formal legal barriers. What is needed, therefore, is a sharp reversal of intellectual orientation. It is critical to defend the freedom of association of all individuals. It is equally critical to decouple the two fundamentally different questions that today are lumped under the single banner of civil rights: civil capacity and discrimination. Governments should concentrate on the protection

of the former and abandon pursuit of the latter. In a society as diverse as our own, any effort to impose a single standard of social correctness on associational choice is bound to lead to endless struggles over its proper articulation. It is a far better solution to allow individuals to go their separate ways, secure in the knowledge that they have the protection of the law behind them in pursuit of their associational freedoms. That was the original message of civil rights law, and that should be the message of the civil rights movement today.